

## COMMENT

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## Why the Law Commissions' consultation paper on surrogacy reform was incomplete

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The Law Commissions of Scotland and England and Wales' joint consultation on [surrogacy](#) reform has now closed to responses.

The [consultation paper](#) entitled 'Building families through surrogacy: a new law' was motivated by compassion towards those who are childless. It was also extensive, informative and useful in recognising that the legislation in the area needs reforming in the UK. However, the portion devoted to ethics was unfortunately rather short (only eight specific pages out of 475) and incomplete.

More seriously, it sought to resist any new ethical discussions about surrogacy, as such. This is regrettable and concerning since as with any consent process with patients, a society as a whole is similarly entitled to reconsider its consent to a procedure through its parliament, at any time, especially if it is contentious. It was thus not sufficient for the consultation to dogmatically take as its [starting point](#) that 'surrogacy is an accepted form of building a family, as recognised by the [government]'. Indeed, if such a point of departure had been used in the past, slavery would never have been abolished in the UK.

Furthermore, the consultation seemed to overlook the reasons why most European countries completely prohibit all forms of surrogacy. The majority of parliamentarians in these states agree that the possible advantages of surrogacy are disproportional to the risks for all involved, including to the surrogates who are generally motivated by selfless empathy towards childless individuals. Consequently, it is completely inappropriate for the UK to ignore the arguments of its neighbours, while simply stating that it is 'correct' in its own position.

The consultation seemed to limit most of the discussion on ethics to the possible exploitation and commodification of the woman who may agree to become a surrogate, while presenting some form of commercialisation of surrogacy as an appropriate way forward (page 33). It indicated on page 40 that 'the ethical debate around surrogacy reflects a tension between autonomy and paternalism', but this ignores several other important ethical challenges.

For example, many would argue that limiting surrogacy is not paternalistic. [Paternalism](#) represents some kind of interference on persons against their will, with the intention of protecting them from harm. Indeed, an important philosophical difference exists between persons selling (or renting) their bodies or parts of their bodies, as such, which is seen as unacceptable in a civilised society – and these individuals being paid for the work of their bodies, as in employment. For instance, it is not paternalistic to limit a person's autonomy to sell themselves into slavery to pay for a very large expense which they cannot, otherwise, address.

Interestingly, the consultation recognised on page 3 that no real and extensive discussion and attitudinal research amongst members of society in the UK relating to surrogacy had taken place. This is surprising since such an investigation should normally be carried out before any legislation is proposed or amended. Moreover,

an enquiry would be very useful since, even for the most informed of commentators, many of the questions relating to surrogacy are complex, including:

- Should a woman ever be encouraged to detach herself, psychologically, from her gestating child?
- What do the intended parents mean when they say that they want a child 'of their own'?
- Can the ethical and relational identity challenges arising from the use of donor eggs and/or sperm ever be resolved for the donor, the intended parents, and the resulting child?
- Can persons ever own (or rent) their bodies, as such, in a civilised society?
- Is there a risk of commodification of children born from commercial surrogacy both in the UK and abroad? How will the children resulting from commercial surrogacy understand, or consider, as they grow up, the manner in which they were brought into existence?
- Should actions which are prohibited in the UK, be legalised just because some individuals are going abroad to bypass the law?

What kinds of psychological risks would exist for the surrogate or the child if they are separated immediately after birth?

Without these and other questions being seriously considered (and answered) it is difficult to accept this consultation as adequate or reliable since it did not really address, or give any information about, the core ethical challenges. Again, if the principle of providing appropriate information in the consent procedure is seen as important for patients, then it is also important for democratic societies and parliaments before they make decisions, such as in considering different forms of surrogacy.

As it stands, the consultation seemed to have been put together by a small number of well-meaning organisations and stakeholders. But a number of the solutions being proposed to the surrogacy problems were unproven, disturbing and even scandal-prone. Proposals which may undermine the very basis of civilised society. Moreover, there is no real evidence that the alarming solutions being suggested were what the general public really wants. This is because the consultation seemed to limit the possible ways forward in a manner which, to be honest, may be considered as a form of undue constraining and even coercion of the responder.

To put the point more fully, in addition to all the extensive and useful work the consultation report provided in other areas, it would have been preferable if it had undertaken a genuine, comprehensive, in-depth and honest appraisal of the different ethical dilemmas and perspectives related to surrogacy.

## SOURCES & REFERENCES